

BEFORE THE BOARD OF HEARING AID DEALERS AND FITTERS

STATE OF IDAHO

ORIGINAL

In the Matter of the Licenses of:

Richard J. Davis,
License No. H-11,

Angela Ragan,
License No. H-402,

Respondents.

Case Nos. HAD-P3-04-99-008
HAD-P3-04-99-009

**MEMORANDUM DECISION
and
RECOMMENDED ORDER**

This matter came on for hearing on March 6, 2001. Complainant Board of Hearing Aid Dealers and Fitters (Board) was represented by Kirsten Wallace of the Attorney General's Office. Respondent Richard J. Davis (Davis) appeared in person and through his counsel, Charles F. Peterson. Counsel for both parties submitted post-hearing briefs on or about April 25, 2001. All claims against Angela Ragan were resolved by virtue of a stipulation and order of dismissal prior to the hearing. The hearing focused solely upon complaints against Richard J. Davis, which constitute Counts One through Four of the Board's Amended Complaint, dated January 10, 2001.¹ Two members of the Board, Steve Rademaker and Jeff Brockett, attended and participated in the hearing.

¹ By stipulation and order, the Board dismissed Count Four of the Amended Complaint against Davis. Accordingly, this memorandum will address only Counts One through Three.

This is a recommended order of the hearing officer. It will not become final without action of the agency head. Any party may file a petition for reconsideration of this recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this recommended order will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

Within twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position on any issue in the proceeding.

Written briefs in support of or taking exceptions to the recommended order shall be filed with the agency head (or designee of the agency head). Opposing parties shall have twenty-one (21) days to respond. The agency head or designee may schedule oral argument in the matter before issuing a final order. The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee of the agency head) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

FINDINGS OF FACT

1. Richard J. Davis (Davis) was licensed by the Idaho State Board of Hearing Aid Dealers and Fitters under License No. H-11 on or about December 16, 1971.

2. Davis has owned and operated U-Select Hearing Aid Service (U-Select) in Idaho Falls, Idaho, since January 1998.

3. Jan Martin (Martin) is a fifty-eight year old woman who has had occasional ear infections since the age of seven. Since 1994, Martin saw Dr. Daniel Hinckley of Idaho Falls for her ear problems. In January 1998, Dr. Hinckley referred Martin to Dr. Gerald Mill for hearing tests. Dr. Mill performed a comprehensive battery of tests on Martin on January 28, 1998, and faxed the results back to Dr. Hinckley's office. Dr. Mill found that Martin's hearing loss was comparable in both ears (also referred to as "symmetrical"), but described the loss in Martin's left ear as a sensory loss and as a mixed loss in her right ear. Greg Freshwater, PAC, of Dr. Hinckley's office, signed a medical clearance for bilateral hearing aids and noted a diagnosis of "bilateral sensory neural hearing loss."² Martin looked into purchasing hearing aids, but could not afford them at that time.

4. Later in the year, Martin's husband noticed an advertisement for an open house at U-Select. He wanted to get Martin hearing aids as a Christmas gift. In response to the advertisement, Martin sought services from U-Select and Davis on November 10, 1998. She completed an intake sheet that, among other things, asked various health- and hearing-related questions. Martin responded that she often experienced dizziness and that she pain or drainage in her left ear "often."

² Although the medical clearance appears to be dated February 23, 1998, there was some confusion in the testimony of Martin as to the exact date. She was clear, however, that the clearance was signed shortly after seeing Dr. Mill.

Martin testified, however, that she had not had an ear infection since she last saw Dr. Hinckley in January 1998 and was not experiencing an infection or any drainage at the time she saw Davis in November 1998. Davis also testified that he did not discover any drainage upon examining Martin's ears. Other than possibly checking "comfort levels", Davis did not perform any tests on Martin during this initial visit. Prior to leaving, Martin signed a waiver of a medical evaluation in the presence of Angela Ragan, Davis's assistant.

5. Davis recommended and fit Martin with Selectone Telex Bi Cros hearing aids. The right ear was an in-the-ear device and the left ear was a behind-the-ear device that used a FM transmitter to send the sound received to the right ear. The left ear itself was left unamplified. A mold with an open vent was prepared and fitted to the left ear. Davis selected the bi cros hearing aid because of Martin's history of ear infections.

6. On December 3, 1998, the hearing aids were delivered to Martin and the parties executed a Purchase Agreement. Martin paid \$2,875.00 for the hearing aids. Martin received an User Instructional Brochure with the hearing aids.

7. Martin had difficulty hearing with the aids and repeatedly returned to U-Select for adjustments. Martin's chief complaints were that she could not discern the direction that sounds were coming from and that, particularly in a crowded room, the aids picked up and amplified surrounding sound to the point that she could not hear what a person standing in front of her was saying. Martin became so frustrated that she eventually stopped wearing the aid on the left ear. The difficulties experienced by Martin were the result of the bi cros system.

8. Bi cros hearing aids should only be used when there is a "dead" ear on one side, requiring the need for amplification on the other side, when the hearing loss is substantially

asymmetrical, or when the use of other devices is medically prohibited. None of these factors were present in this case. Given Martin's hearing loss, she should have been fitted with binaural hearing aids.

9. Using the same mold (with a large open vent) prepared and fitted for Martin's left ear, a behind-the-ear device could have been used to amplify sound into her left ear.

10. The Purchase Agreement stated that "All patients fitted with hearing aids must have a Sound Field Test. . . ." While the evidence is conflicting as to whether any such test was ever performed, at best the test was performed with both hearing aids on and both hearing aids off. Davis did not test the benefit of the aid on the left ear alone.

CONCLUSIONS OF LAW

I. COUNT ONE

In Count One of the Amended Complaint, the Board claims that Davis violated Idaho Code §§ 54-2912(b)(3) and (13) and 21 C.F.R. § 801.420(c)(2)(ii) by failing to refer Martin to a physician after observing a "running ear" or drainage from the ear.

Idaho Code § 54-2912(b)(3) states that any person registered under the act³ may have his license revoked or suspended for a period fixed by the board for engaging in unethical conduct. "Unethical conduct" is defined in § 54-2901(o)(9) as "[e]ngaging in any acts or practices which fail to meet the standard of care for hearing aid dealers and fitters." Idaho Code § 54-2912(b)(13) imposes penalties for "[v]iolating any provisions of this chapter or other applicable federal or state

³ The "act" refers to §§ 54-2901 to 54-2919. *See*, Compiler's note to § 54-2901.

statutes or rules including, but not limited to, the Idaho consumer protection act, relating directly or indirectly to selling, fitting, or dispensing of hearing aids."

The Board argues that the standard of care applicable to hearing aid dealers practicing in Idaho is established by both federal regulations and by the usual and customary practices of hearing aid dealers practicing in Idaho. The Hearing Officer agrees.

Statutes and administrative regulations may define an applicable standard of care. *Cf.*, *Arrington v. Arrington Bros. Const., Inc.*, 116 Idaho 887, 888, 781 P.2d 224, 225 (1989); *Sanchez v. Galey*, 112 Idaho 609, 617, 112 Idaho 609, 618 (1987). To establish a claim under Sections 54-2912(b)(3) and (13), the Board asserts that Davis violated 21 C.F.R. § 801.420(c)(2)(ii), which states:

Part 801 - Labeling.

Section 801.420 - Hearing aid devices; professional and patient labeling.

* * * * *

(c) Labeling requirements for hearing aids.

(1) General. All labeling information required by this paragraph shall be included in a User Instructional Brochure that shall be developed by the manufacturer or distributor, shall accompany the hearing aid, and shall be provided to the prospect user by the dispenser of the hearing aid

* * * * *

(2) Warning statement. The User Instructional Brochure shall contain the following statement:

Warning to Hearing Aid Dispensers

A hearing aid dispenser should advise a prospective hearing aid user to consult promptly with a licensed physician (preferably an ear specialist) before dispensing a hearing aid if the hearing aid dispenser determines through inquiry, actual observation, or review of any other available information concerning the prospective user, that the prospective user has any of the following conditions:

* * * * *

(ii) History of actual drainage from the ear within the previous 90 days.

The Hearing Officer finds that Davis did not violate the provisions of 21 C.F.R. § 801.420(c)(2)(ii).

The regulation governs labeling requirements and the content of an User Instructional Brochure. The only affirmative obligation placed upon a hearing aid dealer by the regulation is to provide, as the dispenser of the hearing aid device, the brochure to the prospective user. 21 C.F.R. § 801.420(c)(1). Evidence at the hearing showed that Martin received the brochure with her hearing aid. The language of Section 801.420(c)(2) merely governs the content of the brochure. The "warning" that a hearing aid dealer "should" advise a prospective user to consult a physician under certain circumstances is simply not a statute or regulation in and of itself sufficient to form the basis of a standard of care.

At the hearing, Dr. Mill and Dr. Sturmak testified about a FDA regulation that they believed imposed a six-month limitation on the use of and reliance upon a medical evaluation.⁴ While the regulation was not specifically identified in the Board's pleadings or at the hearing, the regulation referred to is 21 C.F.R. § 801.421(a)(1). It reads:

⁴ Davis's rebuttal witness, Mr. Nielson, also claimed that he used a six-month period as a personal guideline.

Except as provided in paragraph (a)(2) of this section, a hearing aid dispenser shall not sell a hearing aid unless the prospective user has presented to the hearing aid dispenser a written statement signed by a licensed physician that states that the patient's hearing loss has been medically evaluated and the patient may be considered a candidate for a hearing aid. **The medical evaluation must have taken place within the preceding 6 months.**

(Emphasis added.) The exception referred to in the regulation allows a prospective hearing aid user to waive the medical evaluation requirement under certain circumstances. For the waiver to be valid, the hearing aid dispenser must (1) inform the prospective user that the exercise of the waiver is not in the user's best health interest; (2) refrain from actively encouraging the prospective user to waive the medical evaluation; and (3) afford the prospective user the opportunity to sign a statement of waiver in the form set forth in the regulation. 21 C.F.R. § 801.421(a)(2). Furthermore, **before** the prospective user signs the waiver, the hearing aid dispenser must (1) provide the prospective user a copy of the User Instructional Brochure for a hearing aid that has been, or may be selected for the prospective user; (2) review the content of the User Instructional Brochure with the prospective user orally, or in the predominate method of communication used during the sale; and (3) afford the prospective user an opportunity to read the User Instructional Brochure. 21 C.F.R. § 801.421(b).

The evidence is clear that Martin's medical evaluation occurred more than six months prior to her first visit with Davis. Davis contends that Martin waived the requirement of an additional medical evaluation. While there is evidence that Martin signed a waiver substantially conforming to the requirements of 801.421(a)(2), there is no evidence in the record that prior to Martin signing the waiver, Davis (or anyone acting on his behalf) provided Martin with the User Instructional Brochure for the bi-CROS hearing aid, reviewed the content of the brochure with Martin or afforded

Martin the opportunity to review the brochure. Since Davis failed to comply with the provisions of 801.421(b), the Hearing Officer finds that the waiver signed by Martin was ineffective. Davis was under an obligation to refer Martin for a medical evaluation prior to selling Martin her hearing aids. His failure to refer Martin for a medical evaluation constitutes a violation of 801.421(a)(1), which forms the basis of a finding that Davis violated Idaho Code §§ 54-2912(b)(3) and (13).

Even if the waiver were effective, the Hearing Officer finds that Davis violated the standard of care defined by the usual and customary practices of hearing aid dealers practicing in Idaho by failing to refer Martin to a physician. The act does not specifically define the precise acts that are expected of hearing aid dealers in Idaho, nor is there any case law dealing with hearing aid dealers and their standard of care. However, in the negligence and medical malpractice contexts, the standard of care applicable to health care providers is addressed in both statute and case law. *See*, I.C. §§ 6-1012 and 1013 and related cases. The Hearing Officer will look to these authorities in determining a framework from which to evaluate the standard of care here.

First, a hearing aid dealer and fitter must be compared to a hearing aid dealer and fitter with similar training and in the same category or class, taking into account his or her training, experience, and fields of specialization. I.C. § 6-1012; *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997). Second, any expert witnesses testifying as to the applicable standard of care must have actual knowledge of the standard of care applicable to the time period and locality (often referred to as "community") to which his or her opinion is addressed. I.C. § 6-1013; *Evans*, 129 Idaho at 905. These requirements, however, are not intended to be overly burdensome. *Dulaney v. St. Alphonsus*

Regional Medical Center, 2001 WL 909182, *4. Citing *Clark v. Prenger*, 114 Idaho 766, 769, 760

P.2d 1182, 1185 (1988), the Court in *Dulaney* stated:

The witness must demonstrate a knowledge acquired from experience or study of the standards of the specialty of the defendant physician sufficient to enable him to give an expert opinion as to the conformity of the defendant's conduct to those particular standards, and not to the standards of the witness's particular specialty if it differs from that of the defendant. It is the scope of the witness's knowledge and not the artificial classification by the title that should govern the threshold question of admissibility.

2001 WL 909182, *4. A witness may become familiar with the local standard by contacting and discussing the standard of care with a practitioner in the relevant community or locality. *Id.* at *4-6.

The Board introduced the testimony of two witness, Dr. Mill and Dr. Sturmak, concerning the standard of care expected of hearing aid dealers and fitters in Idaho. Mr. Mill has been a licensed hearing aid dealer and fitter in Idaho for approximately 20 years and practices in the Idaho Falls area. Dr. Sturmak has been a licensed hearing aid dealer and fitter in Idaho since 1987. Although he has not practiced in Idaho Falls, he was a member of the Board, which has statewide jurisdiction, for six years and has taught training classes to dealers and fitters in Idaho. He has met with dealers and fitters across the state on a routine basis and testified that the standard of care for dealers and fitters is uniform throughout the state. The Hearing Officer finds that both Dr. Mill and Dr. Sturmak were qualified to testify concerning the standard of care applicable in this case.

Concerning the referral of a customer for an additional medical evaluation, Dr. Mill testified that a referral would not be necessary if it had been a reasonable time since the last evaluation and the customer had had no problems (e.g., draining) in the interim. Dr. Mill testified that a "reasonable" time would be six months. Dr. Sturmak testified that it is not within the standard of

Care to allow a customer who reported active drainage within 90 days to sign a waiver without a current medical clearance. He further testified that relying upon a ten-month old medical clearance is unreasonable. Based upon this testimony, the Hearing Officer finds that Davis violated the standard care (and by reference Idaho Code §§ 54-2912(b)(3)) by failing to refer Martin to a physician and by relying upon a ten-month old medical evaluation.

II. COUNT TWO

In Count Two of the Amended Complaint, the Board claims that Davis violated Idaho Code §§ 54-2912(b)(3), (5) and (13), IDAPA 24.06.01.450.01, 450.02 and 450.03, and 21 C.F.R. § 801.420(c)(3)⁵ by failing to perform all necessary tests, including sound field testing in the aided and unaided condition.

Idaho Code Section 54-2912(b)(5) imposes penalties upon a registered hearing aid dealer and fitter who engages "in the practice of fitting of or dealing in hearing aids to a person who has not been given all necessary tests utilizing appropriate, established procedures and instrumentation in fitting of hearing aids." IDAPA 24.06.01.450 is intended to define "tests utilizing appropriate procedures" as used in the statute. IDAPA 24.06.01.450.01.⁶ These tests include:

⁵ As discussed above, 21 C.F.R. § 801.420 deals with labeling requirements and the content of the instructional brochure. Although 801.420(c)(3) requires that the brochure include language that the "hearing aid dispenser will conduct a hearing aid evaluation to assess your ability to hear with and without a hearing aid," it does not impose an affirmative and enforceable obligation upon a dispenser to perform such tests. Accordingly, the Hearing Officer finds that Davis did not violate 21 C.F.R. § 801.420(c)(3).

⁶ This section of the IDAPA describes the "purpose" of the rule. It does not impose any affirmative obligations upon Davis. Accordingly, the Hearing Officer finds that Davis did not violate IDAPA 24.06.01.450.01.

02. Pre-Fitting Testing. All prospective hearing aid consumers must be given calibrated pure tone air and bone tests with masking when applicable. Speech tests must be given by appropriate equipment calibrated to current H.T.L. reference levels.

03. Sound Field Testing. Before the prospective consumer purchases a hearing aid or within six (6) weeks afterward, the consumer must be tested by a licensed hearing aid dealer and fitter in both the aided and unaided condition. The purpose of the test is to document the benefit to the consumer. This testing may be accomplished using appropriate sound field testing to ensure repeatability. Suggested stimuli for sound field testing include speech, pulsed pure tone, warble tone, narrow band noise, damp wave trains, and ninety (90) degree modulated noise.

IDAPA 24.06.01.450.

Davis admits that he did not perform any calibrated pure tone air and bone tests or speech tests before fitting Martin for her hearing aids. Instead, he relied upon the tests that were performed by Dr. Mill in January 1998.⁷ On its face, IDAPA 24.06.01.450.02 does not require Davis to perform these tests. It merely requires that the tests be performed "pre-fitting." Since the regulation does not specifically state when the tests must be performed, the Hearing Officer finds that Davis did not violate IDAPA 24.06.01.450.02.

The next question is whether Davis violated the standard of care by failing to administer pre-fitting tests. On this issue, Dr. Sturmak testified that the standard of care requires a hearing aid dealer and fitter to at least "spot-check" a customer who comes in with an audiology test that is more than six months old. Dr. Sturmak testified that this "spot-check" would take less than five minutes and would involve testing a few pure tones to see if the hearing had changed. Davis testified that

⁷ The Hearing Officer finds that the tests performed by Dr. Mill complied with the "pre-fitting" test requirements of the regulation.

he did not have time to do any tests⁸ and simply planned to adjust the hearing aids if Martin's hearing had diminished since January 1998. The Hearing Officer finds that Davis violated the standard of care by failing to at least "spot-check" Martin's hearing prior to fitting her with hearing aids.

Next, the Board contends that Davis failed to perform sound field testing required by IDAPA § 24.06.01.450.03. Davis claims that he performed such testing. In support of his claim, Davis produced an "Individual Hearing Evaluation", which was allegedly partially destroyed in a fire at Davis's office in February 1999. According to Davis, Martin listened to audio tapes of certain words with her hearing aids on and with them off. Martin claims that she never participated in such a test.

Assuming that Davis administered the test, the question is whether the test complied with the requirements of the regulation. First, the regulation requires that the test be performed before the prospective consumer purchases a hearing aid or within six weeks afterward.⁹ No date appears on the "Individual Hearing Evaluation". Davis claims that the portion of the form that would have included the date was destroyed in the fire. Davis believes that the test was performed in January or February. Absent any concrete evidence to the contrary, the Hearing Officer is unable to find that the tests were not completed in a timely manner.

Second, the test must be performed in the aided and unaided condition. The purpose of the test is to document the benefit to the customer. Davis admits that he performed the tests with both

⁸ Davis testified that he **may** have performed some "comfort" tests, which are not "hearing" tests.

⁹ Martin signed the "Purchase Agreement" on December 3, 1998. The sound field tests should have been completed by January 14, 1999.

hearing aids on and both hearing aids off. He did not test whether the bi-cros aid was providing a benefit to Martin by testing her with only one hearing aid on at a time. The Hearing Officer finds that the sound field test performed by Davis was not done in a manner that would document the benefit of the bi-cros (left ear) hearing aid to Martin and therefore did not comply with the regulation.¹⁰

III. COUNT THREE

In Count Three of the Amended Complaint, the Board claims that Davis violated Idaho Code §§ 54-2912(b)(3), (6) and/or (13) by improperly fitting Martin with a bi cros hearing aid.¹¹ All of the hearing aid dealers and fitters who testified stated that fitting a customer who has symmetrical (bilateral) hearing loss with binaural hearing aids is the most appropriate course of action. Bi cros hearing aids are acoustically unsuited to a customer who has symmetrical hearing loss. It is only when Martin's history of ear infections is introduced that the witnesses begin to differ.¹² The

¹⁰ There was some testimony regarding the calibration of the equipment used to test and whether the test was repeatable. These are not express requirements of the regulation and, therefore, cannot form the basis of violation thereof.

¹¹ Idaho Code Section 54-2912(b)(6) imposes penalties upon a hearing aid dealer and fitter who engages in the improper fitting of hearing aids. "Improper fitting" includes a pattern of hearing aid selections or adaptations in which the electroacoustic characteristics of the hearing aid are inadequate for the consumer, or one in which the hearing aid is physically or acoustically unsuited to the consumer. I.C. § 54-2901(i). This includes, but is not limited to any hearing aid or earmold which causes inappropriate feedback, pain or discomfort to the ear within thirty days of the original delivery of the hearing aid to the customer. I.C. § 54-2901(i)(2).

¹² Davis claims that he fitted Martin with the bi cros hearing aids because of history of infections. Davis effectively substituted his opinion and judgment for that of a licensed physician. Martin had seen and been treated by Dr. Hinckley since 1994. Dr. Hinckley, through Greg Freshwater, medically cleared Martin for **bilateral** hearing aids. If Davis was concerned by Dr. Hinckley's recommendation, he should have contacted Dr. Hinckley to discuss his reservations.

Hearing Officer found the testimony of the Board's witnesses, particularly Dr. Sturmak, to be the most credible.

Given the type and severity of Martin's hearing loss and her history of infections, Dr. Sturmak testified that the standard of care required the use of a behind-the-ear device (that amplified sound into Martin's left ear) with an open mold in Martin's left ear, with instructions on how to prevent infection and how to manage the hearing aid device during periods of active drainage. He testified that a cros hearing aid is only appropriate when an ear cannot be aided.¹³ He also testified that Martin's complaints were of the nature that could easily be expected when a cros system is used with her type of hearing loss.

The Hearing Officer finds that Davis improperly fitted Martin with bi cros hearing aids and that, in doing so, he violated Idaho Code §§ 54-2912(b)(3), (6) and (13).

IV. DUE PROCESS

Davis claims that the act and regulations are unconstitutionally vague in not delimiting specific conduct which violates the standard of care. Accordingly, Davis argues that the act and regulations violate his due process rights.

Davis also claimed that fitting Martin's left ear with a BTE device **may** have required that the vent in the mold be reduced in size in the future to obtain the maximum benefit of the device and that reducing the size of the vent would increase the likelihood of Martin developing an infection. This position, supported by Mr. Nielson and Mr. Western, is purely speculative. Dr. Mill and Dr. Sturmak testified that the same mold used by Davis in Martin's left ear could have also been used with a BTE device. Mr. Nielson and Mr. Western agreed.

¹³ Dr. Mill testified that bi cros hearing aids are only appropriate when there is a dead ear on one side, there is substantial asymmetrical hearing loss and/or there is a medical prohibition. None of these factors were present here. (Martin had a medical clearance for bilateral hearing aids.)

Davis makes a couple of references to the act containing criminal penalties. However, the only criminal penalty permitted in the act is found in Section 54-2920. That section applies only to persons who engage in conduct requiring license without a license. It has no application to this case. The act and regulations as applied to Davis are not criminal in nature and will not be construed as such in evaluating Davis's due process claims.

"A civil or non-criminal statute is not unconstitutionally vague if persons of reasonable intelligence can derive core meaning from it." *Capital Care Center v. Idaho Dept. of Health and Welfare*, 129 Idaho 773, 776, 932 P.2d 896, 899 (1997), citing *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 716, 791 P.2d 1285, 1295 (1990). A statute is unconstitutionally vague when persons of common intelligence must guess at its meaning and differ as to its application. *Dupont v. Idaho State Board of Land Commissioners*, 134 Idaho 618, 623, 7 P.3d 1095, 1100 (2000), citing *Olsen*, 117 Idaho at 716. The essential fairness of the law and the impracticability of drafting legislation with greater specificity must also be considered. *Olsen*, 117 Idaho at 715.

Here, "the standard of care for hearing aid dealers and fitters" is not vague. Persons of reasonable intelligence should be able to discern the standard from the conduct of hearing aid dealers and fitters in their communities, from training and from an examination of the statutes and rules governing hearing aid dealers and fitters. If a hearing aid dealer and fitter is unsure about whether particular conduct may violate the standard of care, he can contact other dealers and fitters and/or the Board for feedback. As applied in this case, the standard of care is fair. It has been derived from experts in the area with a great deal of experience. Detailing every behavior that a hearing aid dealer

and fitter is expected to adhere to in every situation is impracticable. The Hearing Officer rejects Davis's due process claims.

V. FINES, COSTS AND FEES

IDAPA 24.06.01.551.01 allows the Board to impose a civil fine not to exceed one thousand dollars upon a licensed hearing aid dealer and fitter for each violation of Section 54-2912(b). For purposes of this regulation, and to summarize the Hearing Officer's conclusions of law, Davis violated Section 54-2912(b) as follows:

1. By engaging in unethical conduct (failing to meet the standard of care for hearing aid dealers and fitters) in failing to refer Martin to a physician. I.C. § 54-2912(b)(3).
2. By violating 21 C.F.R. 801.421 by fitting Martin with hearing aids without a medical evaluation that had been performed in the six months prior to the fitting. I.C. § 54-2912(b)(13).
3. By engaging in unethical conduct (failing to meet the standard of care for hearing aid dealers and fitters) in failing to adequately perform pre-fitting and sound field tests. I.C. § 54-2912(b)(3).
4. By failing to perform all necessary tests required by statute and regulation. I.C. §§ 54-2912(b)(5) and (13).
5. By engaging in unethical conduct (failing to meet the standard of care for hearing aid dealers and fitters) in improperly fitting Martin with bi cros hearing aids. I.C. § 54-2912(b)(3).
6. By improperly fitting Martin with bi cros hearing aids. I.C. §§ 54-2912(b)(6) and (13).


The act and the rules also allow the Board to impose upon a hearing aid dealer and fitter reasonable costs, investigative expenses and attorney's fees incurred in enforcing the act, if the Board revokes or suspends the hearing aid dealer's and fitter's license or places the hearing aid dealer and fitter on probation. I.C. § 54-2914(i). The Board may revoke or suspend a license for a fixed period for any violation of I.C. § 54-2912(b).

RECOMMENDATION

The Hearing Officer recommends that the Board enter an Order:

- A. Placing Davis on probation for a period not to exceed three years, during which time Davis shall not fit any customer with bi cros hearing aids without the express written consent and approval of the Board or its designated agent.
- B. Requiring that Davis pay \$6,000.00 in civil fines to the Board.
- C. Requiring that Davis reimburse the Board for its reasonable costs, investigative expenses and attorney's fees incurred in bringing and prosecuting this action.

DATED this 24th day of September, 2001.



JAMES P. PRICE
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 2001, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Kirsten L. Wallace
Deputy Attorney General
P.O. Box 83720
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